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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL GREGORY CLOUD,

Defendant and Appellant.

D042386

(Super. Ct. No. SCN 155658)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza, Judge. Affirmed.

Paul Gregory Cloud appeals a judgment following his jury conviction of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)). He contends the trial court erred by admitting at trial the preliminary hearing testimony of the victim, Victoria Renaldo, who was found unavailable as a witness by the court under Evidence Code

section 240, subdivision (a)(5).¹ Specifically, Cloud contends that (1) the People did not present admissible evidence of their efforts to locate Renaldo; and (2) that the People's efforts to locate Renaldo were insufficient to find her unavailable as a witness under section 240. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts Underlying Charged Crime

On December 10, 2002, Cloud and Renaldo were homeless and lived together in a tent. After they began arguing, Cloud beat Renaldo's face and body with his fist. She suffered injuries to her face, head and body. The following morning she went to a medical clinic for treatment of her injuries. Judith Mendez, the clinic's social services coordinator, observed Renaldo's injuries and called police. San Diego County Sheriff's Deputy David Robins responded to the call and observed Renaldo's injuries. Renaldo appeared to be upset, frightened and in pain. Renaldo told Robins that Cloud had beaten her and showed him a photograph of Cloud.

An information charged Cloud with inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)).

¹ All further statutory references are to the Evidence Code unless otherwise specified.

B. Use of Renaldo's Preliminary Hearing Testimony

The record shows that Renaldo was subpoenaed to testify at Cloud's trial.² She appeared in the courtroom on May 12, 2003. The court ordered her to return on May 13 at 9:00 a.m. Renaldo appeared as ordered on May 13 and was present outside the courtroom while jury selection was in process. At about 10:30 a.m. the prosecutor informed the trial court in a sidebar conference that Renaldo was missing.

At about 1:30 p.m. that day, in a sidebar conference after the jury had been selected, the prosecutor moved for admission of Renaldo's preliminary hearing testimony under sections 1291 and 240. The prosecutor described the efforts of two district attorney investigators to locate Renaldo since her disappearance that morning. In doing so, the prosecutor did not present sworn testimony regarding the efforts of district attorney investigators or others to locate Renaldo. Rather, in moving for admission of Renaldo's preliminary hearing testimony based on her unavailability, the prosecutor described the efforts that two district attorney investigators made to locate Renaldo. In particular, the prosecutor stated:

"Your Honor, at this time we have been unable to locate Ms. Renaldo. I do have two investigators from my office present in the courtroom, Mr. Carrol Egbert and Mr. Dan Ahrens, and they have

² The dissent asserts that the evidence is unclear as to whether Renaldo appeared pursuant to a subpoena. However, the prosecutor and defense counsel, in discussing Renaldo's disappearance, both referenced her being under subpoena. Further, in a court proceeding after Cloud's trial resulting from Renaldo's arrest for leaving the courthouse during Cloud's trial, the court stated on the record that she had been subpoenaed for Cloud's trial. At any rate, Cloud's trial counsel did not object to the finding that Renaldo was unavailable on the basis that she had not been subpoenaed for trial.

spent the last amount of time, basically since . . . we had a sidebar regarding the victim leaving, trying to locate her. [¶] They did check all of the parking areas of the courthouse. They checked all the nearby coffee shops and doughnut shops. They went over to the North County Transit Center in Vista to see if she was there, to check to try to get a bus to go someplace. They went over to Mr. Brown's residence, where she frequents, twice, and they also left a business card at Mr. Brown's residence, and Mr. Brown did come home and subsequently call us in response to the business card, so Mr. Brown did get the business card.^[3] And Mr. Ahrens ran her to see if she had been arrested today since she was here, and he was not able to find any record of her being arrested. [¶] So they have been unable to locate her."

The prosecutor also stated that her assistant had received a call from Brown, who informed her he had not seen Renaldo and would look for her. The prosecutor stated that she did not know where Renaldo was currently living and did not have any additional information regarding her.

Counsel for Cloud did not object, on hearsay or any other ground, to the admissibility of the prosecution's proof of its efforts to locate Renaldo. Rather, he only asserted that Renaldo's prior testimony should not be admitted because the prosecution had not exercised sufficient diligence in attempting to locate Renaldo.

The trial court found Renaldo was unavailable as a witness under section 240 and granted the prosecutor's motion for admission of Renaldo's preliminary hearing testimony under section 1291, subdivision (a)(2).

³ Brown was a defense witness who had given Renaldo rides to court in the past and whose home Renaldo frequented.

At trial Renaldo's preliminary hearing testimony was read to the jury and other testimony and evidence were also admitted. The jury found Cloud guilty of the charged offense. At Cloud's sentencing, the trial court placed him on probation for three years, subject to certain conditions of probation.

Cloud timely filed a notice of appeal.

DISCUSSION

I. *ADMISSIBILITY OF THE PEOPLE'S PROOF OF DILIGENCE*

Cloud asserts that the offer of proof by the People as to their efforts to locate Renaldo was insufficient to find her unavailable at trial because they did not present any testimony or other admissible evidence. The dissent agrees, concluding that the court erred in admitting Renaldo's preliminary hearing testimony and violated Cloud's Sixth Amendment right of confrontation because of the People's failure to produce admissible evidence of their efforts to locate Renaldo. However, this issue is not cognizable on appeal as Cloud waived the right to assert this error by failing to object to the admissibility of the prosecution's proof at trial.

Section 353 prohibits the reversal of a judgment based upon the erroneous admission of evidence, unless two requirements are satisfied. First, the record must show "an objection to or a motion to exclude or to strike the evidence was timely made and so stated as to make clear the specific ground of the objection or motion." (§ 353, subd. (a).) Second, the appellate court must conclude that "the admitted evidence should have been excluded on the ground stated" and that such admission "resulted in a miscarriage of justice." (§ 353, subd. (b).)

The California Supreme Court has explained waiver in the context of challenging the introduction of evidence at trial as follows: "[T]he rule is that a defendant may not complain on appeal that evidence was inadmissible on a certain ground if he did not make a timely and specific objection on that ground in the trial court." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1255.) "The reasons for this settled rule (Evid. Code, § 353) are sound: 'The objection "must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility."'" (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1434, quoting *People v. Clark* (1992) 3 Cal.4th 41, 126.)

The specific ground for the evidentiary objection must be enunciated at trial in order to preserve it on appeal, and an objection at trial on *another ground* will not preserve the right to appeal on a different basis. (*People v. Lopez* (1978) 81 Cal.App.3d 103, 108.) Thus, for instance, a defendant could not claim that admission of a transcript violated his constitutional right to confront witnesses, where the only objection at trial to the transcript was one of relevance. (*People v. Gamble* (1970) 8 Cal.App.3d 142, 148-149; see also *People v. Horn* (1960) 187 Cal.App.2d 68, 78 [defendant's relevance objection to admission of hospital records at trial did not preserve appellate challenge that records were improper hearsay].)

Here, counsel for Cloud did not merely object on an improper ground to the admissibility of the People's proof of their attempts to locate Renaldo, he did not object to its admissibility *at all*. Cloud only challenged the sufficiency of the People's efforts to

locate Renaldo. As such, Cloud waived the right to assert that the People did not prove their due diligence by competent evidence.⁴

In fact, this case shows precisely why the waiver rule exists. In describing the People's attempts to locate Renaldo, the prosecutor informed the court that her investigators were in the courtroom. If counsel for Cloud had objected to the prosecutor's offer of proof, the prosecutor could have put them on the stand and had them testify, and bring to court any other necessary witnesses, thus curing any deficiencies in the People's evidence. Instead, defense counsel acquiesced in the People's presentation, and thus did not afford the People a chance to make their proof through admissible evidence. (*People v. Gutierrez, supra*, 14 Cal.App.4th at p. 1434.) Accordingly, Cloud waived the right to assert on appeal that the People's proof of their efforts to locate Renaldo was inadmissible.⁵

⁴ The dissent argues that the objection raised by Cloud at trial was to the sufficiency of the evidence admitted to prove Renaldo's unavailability. However, the record shows that Cloud's only objection was to the sufficiency of the People's *efforts* to locate Renaldo. That is, accepting the People's showing as true, the People had not demonstrated that Renaldo was unavailable for trial. No objection was made as to the type of evidence used to demonstrate the People's efforts to locate Renaldo.

⁵ It appears at any rate that the prosecutor's statements concerning what she was told about the efforts to locate Renaldo would not be considered inadmissible hearsay, as they were offered not for the truth of the matter asserted, but to describe the efforts made to locate her. (*People v. Smith* (2003) 30 Cal.4th 581, 608-610 [statement by prosecutor to court as to telephone call establishing unavailability of witness was not hearsay].)

II. *THE PEOPLE'S DILIGENCE IN ATTEMPTING TO LOCATE RENALDO*

Cloud contends that because the People did not use reasonable efforts to locate Renaldo, the trial court erred by finding Renaldo was an unavailable witness under section 240 and admitting at trial her preliminary hearing testimony, thereby violating his constitutional rights of confrontation. We reject this contention.

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. [Citations.] That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. [Citations.]" (*People v. Cromer* (2001) 24 Cal.4th 889, 892; *People v. Smith, supra*, 30 Cal.4th at p. 609.)

Section 1291, subdivision (a)(2), contains a similar requirement. As relevant here, it provides that former testimony is admissible as an exception to the hearsay rule if: (1) the witness is unavailable; and (2) the former testimony is offered against a person who was a party to the action or proceeding and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he or she has at the current proceeding.

To establish unavailability, the proponent of the evidence must show the declarant is absent from the hearing and that the proponent "has exercised reasonable diligence [often referred to as due diligence] but has been unable to procure [the witness's]

attendance by the court's process." (§ 240, subd. (a)(5); *People v. Smith, supra*, 30 Cal.4th at pp. 609-610; *People v. Sanders* (1995) 11 Cal.4th 475, 522-523; *People v. Cummings* (1993) 4 Cal.4th 1233, 1296.)

"Due diligence" is not susceptible to a mechanical definition, but "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Sanders, supra*, 11 Cal.4th at p. 523.) Whether due diligence is shown depends upon the totality of efforts used to locate the witness. (*Ibid.*) Relevant considerations include the character of the prosecution's efforts; whether the search was timely begun; the importance of the witness's testimony; whether leads were competently explored; whether the proponent of the evidence reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena the witness when he or she was available; and whether the witness would have been produced if reasonable diligence had been exercised. (*People v. Cromer, supra*, 24 Cal.4th at p. 904; *People v. Sanders, supra*, 11 Cal.4th at p. 523.)

It is settled that the fact "additional efforts might have been made or other lines of inquiry pursued does not affect [a finding of reasonable diligence]. [Citation.] It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings, supra*, 4 Cal.4th at p. 1298; see also, e.g., *People v. Diaz* (2002) 95 Cal.App.4th 695, 706; *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128.)

Whether a party exercised reasonable diligence to locate a missing witness is a mixed question of law and fact. (*People v. Cromer, supra*, 24 Cal.4th at pp. 900-901.) When, as here, the facts regarding the prosecution's efforts to locate the witness are

undisputed, we evaluate the question of due diligence independently. (*Ibid.*; *People v. Smith, supra*, 30 Cal.4th at p. 610.)

Here, the People submitted sufficient evidence to demonstrate their due diligence in attempting to produce Renaldo at trial. First, the People had procured her attendance at trial by subpoena. She appeared the first two days, but disappeared on the second. Cloud does not assert that the People were in any way remiss in allowing her to leave.

After Renaldo left, the People made reasonably diligent efforts to locate her. They first checked the courthouse restrooms, smoking areas, and cafeteria. They also checked the courthouse parking lot, as well as surrounding businesses, bus stations, and Brown's home, where Renaldo frequently visited. The prosecution also had the police records system checked to determine whether Renaldo had been arrested.

Cloud points to various other efforts that the People could have made to attempt to locate Renaldo, such as searching local hospitals, medical clinics, and homeless encampments. However, these assertions do not demonstrate a lack of diligence by the People. As noted, *ante*, the fact that "additional efforts might have been made or other lines of inquiry pursued does not affect [a finding of reasonable diligence]. [Citation.] It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings, supra*, 4 Cal.4th at p. 1298.)

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

I CONCUR:

O'ROURKE, J.

McDONALD, J., Dissenting.

The majority opinion does not address the merits of this appeal because it concludes Cloud did not preserve for appeal his argument that it was error to admit into evidence at trial Renaldo's preliminary hearing testimony. The majority opinion states "this issue is not cognizable on appeal as Cloud waived the right to assert this error by failing to object to the admissibility of the prosecution's proof at trial." (Maj. opn., p. 5.) However, Cloud did object at trial to the introduction of Renaldo's preliminary hearing testimony; his objection was based on the insufficiency of the evidence she was unavailable to testify at trial. That objection triggered the prosecutor's burden to produce competent evidence showing reasonable diligence was exercised to obtain Renaldo's presence at trial and preserved for appeal the issue of the sufficiency of the evidence of her unavailability. (Evid. Code, § 240, subd. (a)(5);¹ *People v. Smith* (2003) 30 Cal.4th 581, 609; *People v. Enriquez* (1977) 19 Cal.3d 221, 235; *People v. Plyler* (1899) 126 Cal. 379, 382; *People v. Banks* (1966) 242 Cal.App.2d 373, 376.) The People purported to satisfy their burden to produce competent evidence of Renaldo's unavailability by the unsworn statement of the prosecutor, which was in the nature of an opening statement. However, the prosecution never sought to introduce evidence of unavailability; it produced no witness testimony or documentary evidence. The majority opinion analyzes the evidentiary issue as one of the erroneous admissions of evidence to which no

¹ All statutory references are to the Evidence Code unless otherwise specified.

objection was made; it considers the prosecutor's unsworn statement to be evidence of Renaldo's unavailability to which Cloud did not object. However, because the prosecutor's statement is not evidence (*People v. Green* (1963) 215 Cal.App.2d 169, 171-172), the issue is not the admissibility of evidence of unavailability but rather is the sufficiency of the evidence of unavailability. Cloud objected to the sufficiency of evidence of Renaldo's unavailability and may reassert that contention on appeal. The otherwise correct evidentiary analysis of the majority opinion is not helpful because it addresses a legal concept not germane to this appeal.

Perhaps because Cloud objected to the admission into evidence of Renaldo's preliminary hearing testimony and the People did not produce any evidence of Renaldo's unavailability, the People did not raise the issue of Cloud's purported waiver in their appellate brief, an omission that usually precludes consideration of the issue on appeal. "The appellate court has discretion to *disregard* issues not properly addressed in the briefs, effectively treating them as having been *abandoned*. [Citations.] [¶] Similarly, the appellate court can treat as *waived* any issue which, although raised in the briefs, is *not supported by pertinent or cognizable legal argument or proper citation of authority*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 9.21, pp. 9-5, 9-6.) Here the People neither addressed the issue of Cloud's purported waiver nor cited authority in support of that issue. It appears that not only has Cloud not

waived the right to raise on appeal the issue of sufficiency of the evidence of Renaldo's unavailability, the People have abandoned that issue in this appeal.

DISCUSSION

I

Unavailable Witnesses and a Defendant's Right of Confrontation

Cloud contends the trial court erred by finding Renaldo was an unavailable witness under section 240 and admitting at trial her preliminary hearing testimony, thereby violating his constitutional rights of confrontation.

A

A criminal defendant in a state proceeding has a right under the federal Constitution "to be confronted with the witnesses against him." (U.S. Const., 6th and 14th Amends.; *Pointer v. Texas* (1965) 380 U.S. 400, 406.) A criminal defendant in California also has a right under the California Constitution "to be confronted with the witnesses against the defendant."² (Cal. Const., art. I, § 15.) A defendant's right of confrontation "ensure[s] that the defendant is able to conduct a 'personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by

² A criminal defendant in California also has a statutory right to confront witnesses against the defendant. Penal Code section 686 provides: "In a criminal action the defendant is entitled: [¶] . . . [¶] 3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that: [¶]"

his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' [Citations.]" (*People v. Louis* (1986) 42 Cal.3d 969, 982 (disapproved on another ground in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9), quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-243.) "To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling 'into question the ultimate " 'integrity of the fact-finding process.' " ' [Citation.]" (*People v. Cromer* (2001) 24 Cal.4th 889, 897, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.)

However, the right of confrontation is not absolute. (*Chambers v. Mississippi, supra*, 410 U.S. at p. 295; *People v. Cromer, supra*, 24 Cal.4th at p. 897.) There is "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] was subject to cross-examination" (*Barber v. Page* (1968) 390 U.S. 719, 722.) For that exception to apply, the proponent of the witness's previous testimony "must . . . demonstrate the unavailability of" the witness. (*Ohio v. Roberts* (1980) 448 U.S. 56, 65, overruled on another ground in *Crawford v. Washington* (March 8, 2004, No. 02-9410) ___ U.S. ___ [124 S.Ct. 1354, 1355-1356].) Under the federal Constitution, a witness generally is not considered unavailable under the confrontation clause "unless the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial." (*Barber, supra*, at p. 725.) "California allows introduction of the witness's prior

(a) Hearsay evidence may be admitted to the extent that it is otherwise admissible in a

recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness. (Evid. Code, § 240, subd. (a)(5))"³ (*Cromer, supra*, at p. 892.) Section 1291, subdivision (a) provides:

"Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
[¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."⁴

A witness is deemed "unavailable" if that witness is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (§ 240, subd. (a)(5).)

"The proponent of the evidence has the burden of showing *by competent evidence* that the witness is unavailable. [Citation.]" (*People v. Smith, supra*, 30 Cal.4th at p. 609, italics added; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1296 ["The proponent of the evidence, here the People, has the burden of establishing unavailability [of a witness] by competent evidence."]; *People v. Enriquez, supra*, 19 Cal.3d at p. 235 ["The

criminal action under the law of this state. . . ."

³ The state and federal standards for diligence appear to be substantially the same. (*Ohio v. Roberts, supra*, 448 U.S. at pp. 74-76 [referring to both "good faith" and "reasonableness" in discussing Sixth Amendment right of confrontation and prosecution's efforts to locate an absent witness].)

⁴ Cloud does not dispute that the requirements of section 1291, subdivision (a)(2) are satisfied in this case, except for the requirement of witness "unavailability."

burden of proof of unavailability is on the proponent of the evidence [citations], and the showing must be made by competent evidence [citation]."], disapproved on another ground in *People v. Cromer, supra*, 24 Cal.4th at p. 901, fn. 3; *People v. Plyler, supra*, 126 Cal. at p. 382 [unavailability of witness "must be shown by relevant and competent evidence."].) "In the case of a missing witness the prosecution must show *by substantial evidence* that due diligence was exercised in attempting to locate him. [Citations.]" (*People v. Banks, supra*, 242 Cal.App.2d at p. 376, italics added.) *Cromer* stated: "*The prosecution's efforts to locate a missing witness occur outside the courtroom and must be reconstructed in the courtroom from witness testimony and other evidence.*" (*Cromer, supra*, at p. 902, italics added.) "The proof of witness-unavailability must be made by *competent evidence* [citations], which means that the exclusionary rules such as the hearsay, best evidence and opinion rules apply to the evidence offered at a hearing to determine this issue of declarant's unavailability as a witness. [Citation.]" (*People v. Williams* (1979) 93 Cal.App.3d 40, 51, second italics added.) In *People v. Green, supra*, 215 Cal.App.2d 169, the court concluded that a telegram to and a telegram and letter from a witness were incompetent hearsay evidence regarding a witness's unavailability because "there [was] nothing but the unsworn statement of the district attorney to identify or authenticate any of the three communications admitted in evidence." (*Id.* at p. 171.) Noting "the unsworn statement of the district attorney is not adequate to establish the necessary foundation" for admission of preliminary examination testimony of that

witness (i.e., unavailability of the witness), *Green* held that the trial court reversibly erred by admitting that testimony.⁵ (*Id.* at pp. 171-172.) A Kansas court similarly reasoned:

"Did appellants meet the requirement [of laying a proper foundation showing unavailability of a witness]? We do not think so. *There was nothing before the court to justify admission of the transcript except the bare statement of counsel that the witness 'is now a resident of the state of Missouri and out of the jurisdiction of this court.'* *No proof of any sort in support of the statement was offered.* No facts tending to establish his absence from the state were submitted. There is nothing to indicate that any effort had been made to secure the presence of the witness" (*Kansas v. Carter* (1939) 87 P.2d 818, 819, italics added.)

The requirement that the prosecutor or other proponent of the evidence show by competent evidence that the witness is unavailable is consistent with the general rules regarding proof of preliminary facts on which the admissibility of proffered evidence depends. (§§ 400, 405.) A "preliminary fact" (e.g., unavailability of a witness) is "a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of [proffered] evidence" (e.g., a witness's preliminary hearing testimony). (§§ 400, 401.) Generally, when a preliminary fact is disputed, the trial court "shall indicate which party has the *burden of producing evidence* [regarding that preliminary fact] and the burden of proof on the issue as implied by the rule of law under which the question arises." (§ 405, subd. (a), italics added.) The trial court generally has discretion whether to hear and determine the question of admissibility of the proffered evidence out of the jury's presence. (§ 402, subd. (b).) Therefore, if, as in this case, a criminal defendant disputes

⁵ The court noted: "If the prosecutor had in fact sent his telegram and received the replies to it, he could readily have been sworn and so testified He did not take this

the admissibility of a witness's preliminary hearing testimony (e.g., absence of reasonable diligence to procure the witness's attendance at trial), the trial court must conduct a hearing, whether in or out of the jury's presence, at which the prosecution, as the proponent of that evidence, must produce sufficient competent evidence to show the admissibility of that witness's preliminary hearing testimony.

Under section 240, subdivision (a)(5), "the term 'due [or reasonable] diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include ' "whether the search was timely begun" ' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation.]" (*People v. Cromer, supra*, 24 Cal.4th at p. 904.) "[A]ppellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*Id.* at p. 901, fn. omitted.)

B

Cloud asserts the trial court erred by admitting Renaldo's preliminary hearing testimony because there was no sworn testimony or other evidence presented by the prosecutor to establish that Renaldo was unavailable. He argues the prosecutor presented, at most, secondhand versions of the investigators' efforts to find Renaldo, which is insufficient to support a finding of unavailability.

opportunity." (*People v. Green, supra*, 215 Cal.App.2d at p. 172.)

The record in this case shows the prosecutor did *not* present *any* sworn testimony or other competent evidence regarding the efforts of district attorney investigators or others to locate Renaldo.⁶ Rather, in moving for admission of Renaldo's preliminary hearing testimony based on her purported unavailability, the prosecutor, in unsworn statements in the nature of an opening statement, merely described the efforts that two district attorney investigators purportedly had made to locate Renaldo. In particular, the prosecutor stated:

"Your Honor, at this time we have been unable to locate Ms. Renaldo. I do have two investigators from my office present in the courtroom, Mr. Carrol Egbert and Mr. Dan Ahrens, and they have spent the last amount of time, basically since . . . we had a sidebar regarding the victim leaving, trying to locate her.

"They did check all of the parking areas of the courthouse. They checked all the nearby coffee shops and doughnut shops. They went over to the North County Transit Center in Vista to see if she was there, to check to try to get a bus to go someplace. They went over

⁶ The record does not clearly show whether Renaldo had appeared at trial pursuant to a subpoena that had been issued and served on her. Although the prosecutor and defense counsel subsequently referred to prior subpoenas issued and served on her, those references do not clearly identify a subpoena issued and served on Renaldo for appearance at the trial that began on or about May 12, 2003. (Although in another proceeding on May 20 the trial court referred to Cloud's trial and Renaldo being "subpoenaed as a witness" at that trial, that statement was not made until after conclusion of Cloud's trial and therefore cannot constitute "competent evidence" in support of the prosecutor's motion to admit Renaldo's preliminary hearing testimony.) Nevertheless, the record *does* show Renaldo was present in the courtroom on May 12, ordered by the court to return at 9:00 a.m. on May 13, and apparently was present outside the courtroom at or about 9:00 a.m. on May 13 as ordered. Furthermore, although the prosecutor referred to the "original subpoena" served on Renaldo by one of her investigators, the record shows the prosecutor did not present any testimony or other *competent evidence* regarding that subpoena (e.g., which date for appearance) or the investigator's purported service of it on Renaldo.

to Mr. Brown's residence, where she frequents, twice, and they also left a business card at Mr. Brown's residence, and Mr. Brown did come home and subsequently call us in response to the business card, so Mr. Brown did get the business card. And Mr. Ahrens ran her to see if she had been arrested today since she was here, and he was not able to find any record of her being arrested. [¶] So they have been unable to locate her."

The prosecutor also stated her assistant had received a call from Brown, who informed her he had not seen Renaldo and would look for her. The prosecutor stated she did not know where Renaldo was currently living and did not have any additional information regarding her.

Based solely on the prosecutor's unsworn statements, the trial court found the prosecution had exercised reasonable diligence in attempting to locate Renaldo, declared Renaldo unavailable as a witness under section 240, subdivision (a)(5), and granted the prosecutor's motion to admit Renaldo's preliminary hearing testimony under section 1291, subdivision (a)(2). However, because Cloud disputed the admissibility of Renaldo's preliminary hearing testimony based on her purported unavailability, the prosecutor had the burden to produce *competent evidence* showing reasonable diligence was exercised in attempting to procure Renaldo's attendance at trial. (§ 240, subd. (a)(5); *People v. Smith, supra*, 30 Cal.4th at p. 609; *People v. Enriquez, supra*, 19 Cal.3d at p. 235; *People v. Plyler, supra*, 126 Cal. at p. 382; *People v. Banks, supra*, 242 Cal.App.2d at p. 376.) The record in this case shows the prosecutor did *not* present *any competent evidence*, either during a section 402 hearing or otherwise, to show reasonable

diligence was exercised.⁷ The prosecutor's unsworn statements describing the efforts of two district attorney investigators to locate Renaldo do *not* constitute competent evidence. (*People v. Green, supra*, 215 Cal.App.2d at pp. 171-172.) As stated by the Supreme Court in *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512 at page 526, "[w]hile we have just as much faith in counsel's sincerity as the trial court evidently had, such faith does not take the place of testimony or judicial notice." Absent competent evidence showing reasonable diligence, the trial court erred by finding the prosecution had exercised reasonable diligence in attempting to locate Renaldo and finding her unavailable as a witness under section 240, subdivision (a)(5). A criminal defendant need not object at trial to the sufficiency of the evidence to preserve that issue for appeal because a conviction based on insufficient evidence is a denial of due process. (*Thompson v. Louisville* (1960) 362 U.S. 199, 204-206.) Accordingly, the court erred in admitting Renaldo's preliminary hearing testimony and violated Cloud's Sixth

⁷ In other cases involving the admission of a witness's preliminary hearing testimony, the record showed the prosecutors presented sworn testimony and other competent evidence on the issues of whether reasonable diligence was exercised and whether the witnesses were unavailable. (*People v. Smith, supra*, 30 Cal.4th at pp. 608-609; *People v. Cromer, supra*, 24 Cal.4th at p. 904; *People v. Diaz* (2002) 95 Cal.App.4th 695, 706-707; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1432-1433; *People v. Rodriguez* (1971) 18 Cal.App.3d 793, 795-797; cf. *People v. Price* (1991) 1 Cal.4th 324, 424 [defendant, as proponent of witness's prior testimony, "did not present any competent evidence of due diligence," and therefore that prior testimony was properly excluded].)

Amendment right of confrontation.⁸ (*People v. Sandoval*, *supra*, 87 Cal.App.4th at p. 1444.)

II

Prejudice

Cloud contends the violation of his constitutional right of confrontation was prejudicial and requires reversal of his conviction.

As the People concede, when a criminal defendant's Sixth Amendment right of confrontation is violated, the People have the burden on appeal to show that error is

⁸ The erroneous admission of Renaldo's preliminary hearing testimony also violated Cloud's rights of confrontation under article I, section 15 of the California Constitution and Penal Code section 686. However, because a more stringent standard of prejudice applies to violation of Cloud's Sixth Amendment right of confrontation, focus on that error is appropriate for purposes of determining whether the error was prejudicial. Disposition of this appeal on the ground of lack of competent evidence to show reasonable diligence obviates the need to address the question of whether the purported actions taken by prosecution investigators, *had* those actions been proved by competent evidence, would constitute reasonable diligence under section 240, subdivision (a)(5) and the Sixth Amendment. Assuming *arguendo* the prosecutor had presented competent evidence showing a subpoena had been issued and served on Renaldo requiring her attendance at the trial beginning on May 12, that fact would have been insufficient, in itself, to show the prosecutor used reasonable diligence to obtain her presence at trial. *People v. Cromer*, *supra*, 24 Cal.4th 889 does not expressly or impliedly conclude that issuance and service of a subpoena on a witness is necessarily a sufficient showing, *per se*, of reasonable diligence, and there appears to be no case to support that proposition. On the contrary, courts appear to consider other circumstances, in addition to issuance and service of a subpoena on a witness, in determining whether a prosecutor has used reasonable diligence to obtain a missing witness's presence at trial. (See, e.g., *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128; *People v. Featherstone* (Mich.App. 1979) 286 N.W.2d 907, 908-909.) The mere issuance and service of a subpoena on a witness requiring his or her appearance at trial, without any additional efforts by a prosecutor to obtain that missing witness's presence at trial, does *not* constitute reasonable diligence, as a matter of law, in support of a finding that the missing witness is unavailable for purposes of a defendant's federal and state constitutional rights of confrontation.

harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140; *People v. Brown* (2003) 31 Cal.4th 518, 538; *People v. Enriquez, supra*, 19 Cal.3d at pp. 235-237; *People v. Sandoval, supra*, 87 Cal.App.4th at p. 1444.) Alternatively stated, the People must show there is no reasonable possibility that the wrongly-admitted evidence might have contributed to the defendant's conviction. (*Chapman, supra*, at p. 24.)

It is reasonably possible that Renaldo's preliminary hearing testimony, erroneously admitted by the trial court in violation of Cloud's Sixth Amendment right of confrontation, might have contributed to his Penal Code section 273.5, subdivision (a) conviction. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Penal Code section 273.5, subdivision (a) provides:

"Any person who willfully inflicts upon a person who is his or her . . . cohabitant [or] former cohabitant, . . . corporal injury resulting in a traumatic condition, is guilty of a felony"

Therefore, the prosecutor was required to prove beyond a reasonable doubt that Cloud willfully inflicted corporal injury on Renaldo, which injury resulted in a traumatic condition, and that at the time of such infliction Renaldo was Cloud's cohabitant or former cohabitant. However, had Renaldo's preliminary hearing testimony been properly excluded, there would have been insufficient evidence to prove beyond a reasonable doubt that Renaldo and Cloud were cohabitants or former cohabitants on December 10, 2002, the date of the alleged incident. Although the prosecutor presented the testimonies of Mendez and Robins, their testimonies did not include any information regarding whether Renaldo and Cloud were cohabitants or former cohabitants. Furthermore,

although the defense presented the testimony of Dennis Brown, his testimony was insufficient to constitute proof beyond a reasonable doubt that Renaldo and Cloud were cohabitants or former cohabitants at the time of the incident.

Brown testified that he had known Renaldo and Cloud for a few years. On cross-examination, the prosecutor asked Brown: "[A]t some point, you became aware that they [i.e., Renaldo and Cloud] had a dating relationship?" Brown replied: "Oh, yes." The prosecutor then asked: "And they were living together?" Brown replied: "Yes." Except for Renaldo's preliminary hearing testimony, that testimony by Brown was the *only* evidence on the issue of whether Renaldo and Cloud were cohabitants or former cohabitants at the time of the incident.⁹ (§ 273.5, subd. (a).) However, assuming *arguendo* Brown's testimony was sufficient to prove beyond a reasonable doubt that Renaldo and Cloud were *at some point* cohabitants, his testimony is not sufficient to prove beyond a reasonable doubt that Renaldo and Cloud were either cohabitants or former cohabitants *on December 10, 2002*, the date of the alleged incident. Brown testified at trial on May 14, 2003. However, his trial testimony did not specify *when* Renaldo and Cloud were *living together*. Rather, Brown merely responded affirmatively

⁹ Renaldo's preliminary hearing testimony, erroneously admitted, included extensive testimony regarding her relationship with Cloud. She testified they were living together on December 10, 2002, and had been living together continuously for several days before December 10, 2002. She testified that they lived together until approximately February 10, 2003. She also referred to Cloud as her "significant other" as of December 10, 2002. Although that testimony presumably would have been sufficient to prove beyond a reasonable doubt that Renaldo and Cloud were cohabitants on December 10, 2002, it was erroneously admitted by the trial court and cannot be considered as evidence in support of the jury's verdict.

to the prosecutor's question whether Renaldo and Cloud "at some point" were living together. It is possible that point in time occurred after December 10, 2002 (and before May 14, 2003). Because the prosecutor did not ask Brown whether Renaldo and Cloud were living together, or had been formerly living together, on December 10, 2002, Brown's testimony does not prove beyond a reasonable doubt that Renaldo was a cohabitant or former cohabitant of Cloud's *at the time* he allegedly inflicted corporal injury on her. (§ 273.5, subd. (a).) Therefore, the erroneous admission of Renaldo's preliminary hearing testimony is not harmless beyond a reasonable doubt.¹⁰ (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Furthermore, had Renaldo's preliminary hearing testimony been properly excluded, there also may have been insufficient evidence to prove, beyond a reasonable doubt, that *Cloud* inflicted the corporal injuries on Renaldo. Absent Renaldo's preliminary hearing testimony, the only evidence regarding who may have caused her injuries was provided by Robins. He testified that on December 12, 2002, he saw bruises on Renaldo's face, arms and back. Robins testified that Renaldo showed him a photograph of the person who she said had beaten her. Robins apparently identified

¹⁰ Furthermore, had the trial court excluded Renaldo's preliminary hearing testimony, the defense may very well have made the tactical decision to not call Brown as a defense witness. The defense apparently called Brown to impeach Renaldo's credibility. If Brown had not been called as a witness, there would have been *no evidence* that Renaldo and Cloud were living together *at any time*. Neither Mendez nor Robins testified regarding the relationship between Renaldo and Cloud. Therefore, had Renaldo's preliminary hearing testimony been properly excluded, it is reasonably possible, and even probable, that Brown would not have testified and Cloud would not have been convicted of the section 273.5, subdivision (a) offense.

Cloud in the courtroom as the person depicted in that photograph. Robins also testified Renaldo told him the name of that person was Paul Cloud. Although Mendez also testified that Renaldo showed them a photograph of the person who caused her injuries, Mendez was not asked to, and did not, identify Cloud as the person in that photograph. Therefore, absent Renaldo's preliminary hearing testimony, the only evidence tending to show Cloud was the person who inflicted the injuries on Renaldo was Robins's testimony. However, it is reasonably possible the jury may not have found, beyond a reasonable doubt, that Cloud was the person who inflicted Renaldo's injuries based solely on Robins's recollection of his interview of Renaldo six months before. Furthermore, Renaldo's statements to Robins during that interview were hearsay. Although Cloud's counsel did not object at trial to Robins's testimony on those hearsay statements, his counsel may have made a tactical decision to not object to those statements because Cloud had already been clearly and directly identified by Renaldo, the victim, in her preliminary hearing testimony, which had previously been presented by the prosecutor and erroneously admitted by the trial court. Therefore, had Renaldo's preliminary hearing testimony been properly excluded, it is reasonably possible, and even probable, that Cloud's counsel would have objected to Robins's hearsay testimony and the trial court would have sustained that objection.¹¹ Absent that hearsay evidence and Renaldo's

¹¹ Robins's testimony on Renaldo's hearsay statements would not clearly have been admissible as spontaneous statements under section 1240. Section 1240 requires that the hearsay statement be "made spontaneously while the declarant was under the stress of

preliminary hearing testimony, there would have been *no evidence* showing *who* inflicted the injuries on Renaldo. Therefore, it is reasonably possible that Cloud would not have been convicted of inflicting corporal injury on Renaldo had the trial court properly excluded Renaldo's preliminary hearing testimony, because there could have been insufficient evidence for the jury to find beyond a reasonable doubt that Cloud inflicted the injuries on Renaldo. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Cloud did not have a full opportunity to impeach Renaldo's credibility at trial. Cloud *was* able to present Brown's testimony that Renaldo experienced hallucinations, took medications, and was not always truthful. Brown testified that Renaldo did not have much credibility. Also, the trial court granted Cloud's request for judicial notice that Renaldo had two prior felony convictions for obtaining or attempting to obtain a controlled substance (i.e., codeine) by means of fraud, deceit and misrepresentation. However, despite Cloud's attempts to impeach Renaldo's credibility, he did not have a full opportunity to do so. Renaldo testified at the preliminary hearing that she lived with Cloud, who beat her and caused her injuries. This crucial testimony regarding the alleged section 273.5, subdivision (a) offense was read to the jury. "There was no opportunity for the jury to observe [Renaldo] and conclude for itself, based on that observation,

excitement caused by such perception" of the event. The record shows Renaldo did not make the hearsay statement to Robins until more than 12 hours after the alleged incident. Although lapse of time is not determinative of a section 1240 exception (*People v. Poggi* (1988) 45 Cal.3d 306, 319), it is a relevant factor and it is doubtful the trial court would have found Renaldo's statement to Robins to constitute a "spontaneous" statement under section 1240 in the circumstances of this case.

whether [Renaldo] was telling the truth." (*People v. Sandoval, supra*, 87 Cal.App.4th at p. 1445.) Furthermore, Renaldo was not present at trial to be subjected to comprehensive, rigorous cross-examination by Cloud's counsel. Although Cloud's counsel cross-examined Renaldo during her preliminary hearing testimony, the jury was unable to observe her demeanor during that testimony and, in any event, that cross-examination may not have been as rigorous as it might have been had she testified at trial. "A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." (*Barber v. Page, supra*, 390 U.S. at p. 725.) Therefore, any impeachment of Renaldo's credibility that Cloud was able to effect at trial was not an adequate substitute for cross-examination of Renaldo had she testified at trial. (*People v. Cromer, supra*, 24 Cal.4th at pp. 896-897; *Chambers v. Mississippi, supra*, 410 U.S. at p. 295.) The erroneous admission of Renaldo's preliminary hearing testimony violated his Sixth Amendment right of confrontation and is not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The judgment should be reversed.

McDONALD, J.